No. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE,
ROBERT WELLMAN, JR., RAMONA WELLMAN,
CRAIG WELLMAN, TERRY WELLMAN and
WELLMAN RANCH COMPANY
a dissolved Montana corporation,

Respondents.

PETITIONER'S REPLY BRIEF

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I. THIS ACTION DOES NOT INFRINGE UPON RETAINED TRIBAL SOVEREIGNTY

The respondents and amici tribes argue that since this litigation involves reservation Indians, it can proceed nowhere but in tribal court. To permit otherwise would infringe on the jurisdiction of the tribal courts. The tribes even argue that the infringement doctrine precludes federal (or state) jurisdiction over almost any reservation related claim, even if the tribal court itself could not hear the case. (See Brief of Amicus Curiae Blackfeet Tribe of Indians at page 19 and Brief of Amici Curiae Navajo Nation et al at page 25.)

This entire line of argument is unsound. As the briefs of the amici demonstrate, the argument leads to an incongruous result. All manner of Indian-related litigation and all species of litigants would lack a forum, since federal and state courts would be divested of jurisdiction over them, even though tribal courts might not be invested with that same jurisdiction. This case is a perfect example. Iowa Mutual filed an action for a declaration of its rights pursuant to 28 U.S.C., Sec. 2201. The Blackfeet Law and Order Code contains no authorization for its tribal court to hear comparable disputes.[1] One questions what perceived aspect of federal Indian policy is being furthered by such a state of affairs, particularly in light of this court's own recent recognition of the "weighty" federal

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[1]Amici note that Iowa Mutual raised its lack of coverage as an affirmative defense in the tribal court action. They are correct. Common notions of pleading (which notions we can only assume apply in the Blackfeet Tribal Court) require nothing less. See Rule 8(b), Fed. Rules of Civil Procedure. Iowa Mutual's raising of an affirmative defense can, under no circumstances, be viewed as investing the tribal court with the power granted federal courts under 28 U.S.C., Sec. 2201. Compare Skelly Oil Co. vs. Phillips Petroleum Co., 339 U.S. 667 (1950) with Liberty Warehouse Co. vs. Grannis, 273 U.S. 70 (1927).

interest that all citizens have access to the courts. Three Affiliated Tribes vs. Wold Engineering, ____ U.S. ____, 90 L. Ed. 2d 881, 892 (1986). That interest is totally frustrated if the access in question is only to a court which has not been empowered to resolve the matter in controversy between the litigants.

Apart from the patently unfair result to which respondents' and amici's infringement argument leads, there is the equal, if not greater, problem, that the argument stems from a faulty premise.

To our opponents, infringement is an outgrowth of the concept of retained tribal sovereignty. To whatever extent that concept may have been a factor in Williams vs. Lee, 358 U.S. 217 (1959), it is clear that this court has now moved beyond retained sovereignty as a justification for its Indian law decisions. Since *Williams*, this court has stated that retained sovereignty is "of a unique and limited character." United States vs. Wheeler, 435 U.S. 313, 323 (1978). It is limited primarily to *internal affairs;* there has been an implicit divestiture of sovereignty involving the relations between an Indian tribe and non-members. *Id.* at page 326. The trend has been *away* from retained sovereignty *to* the idea of federal pre-emption. Three Affiliated Tribes vs. Wold Engineering, *supra* at page 889.

With the concept of federal pre-emption as the context within which this case is to be decided, the issue at hand reduces itself to the following question:

> Does the federal pre-emption doctrine divest federal courts of federal jurisdication over Indian-related claims?

Or, even more simply:

> Have the federal courts pre-empted themselves of Congessionally mandated jurisdiction?

We think not.

Iowa Mutual finds it amusing that the amici can present extensive arguments about the interplay between tribal and federal (or state) civil jurisdication without any reference to perhaps this court's most detailed recent analysis of the subject, Montana vs. United States, 450 U.S. 544 (1981). Their omission is telling, as is the respondents' passing reference (respondents' Brief at p. 13) to *Montana* as a case supportive of their position.

To the contrary, when this court demonstrated in *Montana* the application of principles drawn from reservation criminal cases to the civil law area, the meaning was clear. The infringement doctrine, on which cases such as *Williams, Kennerly*[2] and *Fisher*[3] rest, is an outgrowth of the federal pre-emption doctrine, not a manifestation of retained tribal sovereignty. In other words, the right of reservation Indians to "make their own laws and be ruled by them," as announced in *Williams* (358 U.S. at 254), is the right to make their own laws and be ruled by them because the federal government has pre-empted state governments from doing so. The federal government has, however, not pre-empted itself. Indeed, according to this court in *Montana,* it is the tribes themselves which are pre-empted:

> "Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Id., at 322, n 18, 55 L Ed 2d 303, 98 S Ct 1079. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Montana vs. United States, *supra* 450 U.S. at 564.

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[2]Kennerly vs. District Court, 400 U.S. 423 (1971).

[3]Fisher vs. District Court, 424 U.S. 382 (1976).

On that basis, amici and respondents are wrong to argue that it is petitioner's burden to demonstrate a "clear and plain" congressional statement to extend diversity jurisdiction onto Indian reservations. See e.g. United States vs. Dion, ____ U.S. ____, 90 L Ed. 2d 767 (1986). It is they who need to demonstrate an "express congressional delegation" in derogation of the clear language of the diversity statute, 28 U.S. Sec. 1332. They have not.

II. THE ERIE DOCTRINE IS NOT OFFENDED BY THE EXERCISE OF DIVERSITY JURISDICTION IN CASES INVOLVING RESERVATION INDIANS.

The real problem which this case presents has, therefore, nothing to do with any perceived threat to the sovereign status of Indian tribes. The difficulty here is in reconciling the doctrine of Erie R.R. vs. Tompkins, 304 U.S. 64, (1938) and the Rules of Decision Act, 28 U.S.C. Sec. 1652, with the infringement doctrine, as first announced in the *Williams* case. On this point, Iowa Mutual agrees with the analysis expressed by amicus United States, at page 23 of its Brief. Both *Erie* and the Rules of Decision Act provide a guide as to the basis for adjudicating a controversy that has been brought before a federal court. However, they do not determine the ability of that court to hear that controversy in the first place. There is no real conflict with Woods vs. Interstate Realty Co., 337 U.S. 535 (1949). There is no state "door-closing" statute involved here. No state policy is being frustrated. It is only federal law — and really federal common law — which is implicated.[4]

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[4]Compare the discussion of federal common law in National Farmers Union Insurance Co. vs. Crow Tribe of Indians et al, 471 U.S. ____, 85 L. Ed. 2d 818 (1985) with Erie R.R. vs. Tompkins, *supra* at page 78: "There is no federal general common law."

Respondents and the other amici then raise the specter of disparate treatment, if cases like this one are allowed to proceed in federal court. Non-diverse parties with similar controversies will be relegated to tribal court, whereas diverse parties will be able to bring their cases in federal court, which, by the above-cited authorities, will decide those cases according to state law.

There are a number of responses to that perceived problem. First, one ought to admit that it is not a problem. This case demonstrates why. One need only ask — what body of law would the Blackfeet Tribal Court use in resolving Iowa Mutual's declaratory judgment action, concerning the application of its insurance policies? The Blackfeet Tribe has no insurance code, nor any recognized body of insurance law. The tribe's Law and Order Code does state:

> "In all civil cases and in all cases arising under Chapters 3 and 7, the Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the Tribe, not prohibited by such Federal Law. Where any doubt arises as to the customs and usage of the Tribe, the court may request the advice of counselors familiar with these customs and usages. Any matters that are not covered by the traditional customs or by ordinances of the tribal court according to the laws of the state. The tribal court shall, in its discretion, turn over to other courts of records cases as it deems necessary." Blackfeet Tribal Code, Chapter 2: Civil Action, Sec. 2: Law Applicable.

Unless there are some Blackfeet customs dealing with commercial general liability policies, the tribe's own code suggests that state law will be the basis for any decision. Indeed, the respondents themselves tacitly concede as much, since their action in Blackfeet Tribal Court is predicated on Montana insurance law. (See for instance,

Joint Appendix, page 20.) As a practical matter, the same body of substantive law should be used to decide this case were it to proceed in tribal, state or federal court. If there is a potential for disparate treatment because the litigant in such a case happens to be a reservation Indian, the problem is not with the federal courts, but rather with the tribal court, which should be applying state law, but whose errors in such application are exempt from state court review.

A second response to the disparate treatment argument is that it is based on an unsound premise. By definition, almost every conceivable diversity case will involve a dispute between a reservation Indian and an outsider. The authority of the tribe over that outsider is questionable at best. Montana vs. United States, *supra*. Tribes do possess the limited ability to physically exlude such outsiders from their reservations or to tax them for activities for which they are permitted to conduct on them. See Merrion vs. Jicarilla Apache Tribe, 455 U.S. 130, 138-9 (1982); see also Montana vs. United States, *supra,* at p. 565. Admittedly, this court has speculated that tribes "may retain" civil authority to regulate the conduct of non-Indians on fee land "where that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at page 566. The language employed suggests that an actual physical presence is required. Moreover, to apply that language to this case would completely eviscerate its meaning. It has been suggested that this private dispute between Iowa Mutual and the LaPlantes and Wellmans does threaten the political integrity of the Blackfeet Tribe because the authority of the tribe's court has been challenged. Such an argument is classic bootstrapping. It could be used in every dispute involving a non-member of the tribe. What

has been described as "limited authority" could thereby be translated into pervasive authority.

If Indian tribes have but "limited authority" over the activities of non-members, perhaps the reasoning of *Williams* and *Kennerly* ought to be re-examined. In stating as much, we concede that those two decisions — when considered in light of the facts of those two cases — appear proper. A dispute between the owner of a reservation trading post or grocery store and an Indian customer ought to be resolved on the reservation. However, the impact has been far greater than the credit disputes in *Williams* and *Kennerly*. The result has been to divest state courts of jurisdiction over all sorts of controversies, simply because one of the litigants happens to be a reservation Indian, regardless of the fact that tribal courts may be equally lacking in any real authority over the other litigant.[5] In truth, whatever authority that is possessed by tribal courts has come by default and cannot be reconciled with the broad principles set forth in *Wheeler, Oliphant, Merrion* and *Montana*.

Any problems of disparate treatment can be resolved by this court re-examining the rationale underlying Williams vs. Lee. The result ought to be a clearer demarcation of the line between tribal and state court

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[5]Article VI, Sec. 1 of the Constitution of the Blackfeet Tribe of the Blackfeet Reservation, approved by the Secretary of the Interior pursuant to the Act of June 6, 1934 (48 Stat. 984) provides: "The Council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the body of the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and the attached by-laws . . . (k) to promulage ordinances for the purpose of safeguarding the peace and safety of the residents of the Blackfeet Reservation, and *to establish minor courts for the adjudication of claims or disputes arising amongst the members of the tribe* charged with the commission of offenses set forth in such ordinances." (Emphasis added.)

jurisdication. The former should be recognized for what it was meant to be — a forum for resolution of intra-tribal disputes. Such a result is, in fact, fully consistent with two cases relied upon by the respondents and amici in their own analysis of the issue — Santa Clara Pueblo vs. Martinez, 436 U. S. 49 (1978) and Fisher vs. District Court, *supra,* since both cases do involve internal tribal matters. Other controversies, including those between reservation members and outsiders, belong elsewhere. They belong in the courts in which both the reservation members and outsiders may participate through their shared rights and obligations as citizens. If the boundaries of tribal and state court jurisdiction are more precisely drawn, the concern over disparate treatment will evaporate. The *Erie* doctrine will not be violated. Additionally the diversity statute can be applied as it was written, without the need to resort to the legalistic contortions advocated by respondents and amici, in their invocation of the abstention or preclusion doctrines, and without the risk of leaving any litigant or class of litigants without a proper judicial forum within which their disputes can be resolved.

IiI. ALLOWANCE OF DIVERSITY CLAIMS AGAINST RESERVATION INDIANS IS CONSISTENT WITH FEDERAL INDIAN POLICY.

Respondents and amici argue that allowing this type of lawsuit would frustrate federal Indian policy. That policy is identified as one of encouraging tribal self-government. Indeed, respondents refer to all sorts of congressional enactments which they contend buttress their analysis. See Respondents' Brief, pages 8-10.

While such legislation unquestionably manifests Congress' awareness of its stewardship responsibilities to Indian tribes, many of the enactments, particularly the

appropriation bills, serve as little more than tacit recognition of the deplorable financial condition of Indian tribes as a whole and of many of their individual members.

To argue that it is federal policy to strengthen tribal institutions really begs the question. The real question is to ask what the function or task of a particular institution is, be that institution strengthened through federal largesse or not. The institution of tribal courts exists, as argued above, to provide a forum for the resolution of internal tribal disputes. Strengthening such an institution should not be confused with an expansion of its role. The latter should not be encouraged, either expressly or implicitly, in the name of the former.

If there is a clear congressional expression of policy regarding the role of tribal courts, that expression can be found in Public Law 280. While this Court in Kennerly vs. District Court, *supra,* mandated strict compliance with the procedures set forth in that enactment for the assumption of full state civil jurisdiction on reservations, it is beyond argument that Public Law 280 exists to facilitate such transfers. Public Law 280 was enacted to promote the gradual assimilation of Indians into the dominant non-Indian culture. Three Affiliated Tribes vs. Wold Engineering *supra,* 90 L.Ed. 2d at page 890. Such assimilation is not fostered by the maintenance of barriers between tribal and state or federal courts; nor is it encouraged by an expansion of the role of the tribal courts, at the expense of state and federal systems. That assimilation is, however, furthered by not creating a judicial exception to the diversity statute.

The approach which we advocate is not inconsistent with this Court's own recent analysis of federal Indian policy in National Farmers Union Insurance Co. vs. Crow Tribe of Indians, et al, 471 U.S. ____, 85 L.Ed.2d 818 (1985), wherein the federal government's power over Indian tribes was characterized as "plenary." *Id.* at page 824. Admittedly the civil jurisdication of tribal courts over

non-Indian property owners was not "automatically foreclosed," (*Id.* at page 826) even though the question was, in the final analysis, found to be a federal one. By the same token, the question of tribal court civil jurisdication over non-Indian, *non*-property owners must be viewed as intrinsically federal.

Unlike the petitioner in *National Farmers,* Iowa Mutual did not initiate this action for the express purpose of challenging the jurisdiction of a tribal court (even though, admittedly, that issue has been drawn into this case). Iowa Mutual filed this action to pursue a federally sanctioned remedy under 28 U.S.C., Sec. 2201. The issue here is whether federal Indian policy has implicitly divested federal courts from the ability to provide that remedy. The policy considerations which led to the "deferral" approach in *National Farmers* do not exist here.

Given the plenary power of the federal government in this area, there is no reason to seek input from tribal courts before determining whether federal Indian policy justifies an implicit divestiture of federal jurisdiction over lawsuits between outsiders and reservation Indians. It is time, instead, to declare tribal court jurisdiction "automatically foreclosed," based upon the principles discussed above, which are drawn from existing statements of federal Indian policy. To do otherwise will be to expand — essentially by default — the jurisdiction of tribal courts beyond anything contemplated in the "relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at page 827. It ought to be recognized that life on Indian reservations today is vastly different than 100 years ago, when the federal government and the various tribes entered into the treaties creating those reservations.

Commercial and social interaction between reservation Indians and outsiders is a fact that must be confronted, particularly since it appears to be the policy of the federal government to encourage such interaction. Three Affiliated Tribes vs. Wold Engineering, *supra.* Iowa Mutual posits that assimilation of reservation Indians into the mainstream of American society will be discouraged, rather than encouraged, if a person's status as a reservation Indian means that the only place where disputes with him can be resolved will be tribal court. Outsiders such as Iowa Mutual will remain precisely that — outsiders. They will have to ask themselves whether the risks involved outweight any potential advantages of dealings with reservation Indians. In the long run, those dealings will be discouraged, to the ultimate detriment of both Indians and non-Indians alike. If diversity jurisdiction is going to be defeated in the name of protecting tribal self-government, it will be a pyrrhic victory indeed.

IV. THERE IS NO NEED FOR ANY FURTHER EVIDENCE OF CONGRESSIONAL INTENT TO BRING RESERVATION INDIANS WITHIN THE SCOPE OF THE DIVERSITY STATUTE.

Repsondents and amici employ historical analysis to argue that the diversity statue was never intended to apply to reservation Indians and that we need some expression of congressional intent that the statute be read in that fashion.

Their analysis is flawed. As the various authorities cited by respondents and amici implicitly establish, the question of civil jurisdiction over reservation related mat-

ters was not addressed by this court until the *Williams* case in 1959.[6]

The 1924 grant of citizenship status to Indians, now codified as 8 U.S.C., Sec. 1401(a)(2), came 35 years before the *Williams* decision and 14 years before Erie R.R. vs. Tompkins. This court should not be reluctant to implement that grant in conjunction with the diversity statute, 28 U.S.C., Sec. 1332, simply because back in 1924 Congress failed to anticipate the *Erie* and *Williams* cases, without which this dispute would not exist. In the final analysis, any acknowledgement that reservation Indians come within the scope of the diversity statute works no abrogation of any treaty rights. Cf. United States vs. Dion, *supra,* 90 L.Ed.2d at pages 773-774.

V. THE WEEKS CASE HAS NOT OBVIATED THE PROBLEM NOW BEFORE THIS COURT.

Attention has been directed to the recent decision from the Eighth Circuit Court of Appeals in Weeks Construction Inc. vs. Oglala Sioux Housing Authority, 797 F.2d 668 (1986). Even though the *Weeks* panel expressly declined to overrule Poitra vs. Demarrias, 502 F.2d 23 (8th Cir. 1974), cert. den'd, 421 U.S. 934 (1975), respondents and amici contend that the Eighth Circuit has now aligned itself with the Ninth Circuit's position as expressed in the *R. J. Williams* case.[7]

While we do not agree entirely with the *Weeks* court's analysis, the *Weeks* case can be readily distinguished from

[6]Respondents have made reference to the 1855 opinion of Attorney General Cushing quoted by this court in National Farmers Union Insurance Co. vs. Crow Tribe of Indians, et al, supra, 85 L. Ed.2d at page 826. However, consistent with our analysis, the passage quoted from Attorney General Cushing's opinion appears to be referring only to internal, intra-tribal matters, as opposed to disputes between members and non-members.

[7]R. J. Williams Co. vs. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), cert. den'd. ____ U.S. ____, 87 L. Ed.2d 612 (1985).

the situation presented here. The critical focus of the *Weeks* court's analysis was the status of the defendant Housing Authority as a tribe-chartered entity. Since it was not a state chartered corporation, its citizenship status was questionable for diversity purposes, even taking into account the assumption that it conducted most of its business in South Dakota. 28 U.S.C., Sec. 1332(c); compare Burton vs. United States Olympic Committee, 574 F.Supp. 517 (C.D. Cal. 1983) with R.C. Hedreen Co. vs. Crow Tribal Housing Authority, 521 F.Supp. 599 (D. Mont. 1981). Under the circumstances, while we do not approve of the handling of the *Weeks* case, we can appreciate the hesitancy of the Court of Appeals to allow that litigation to proceed in federal court before allowing the tribal court to first consider the Housing Authority's status.

As opposed to the uncertainty over the citizenship status of a tribal housing authority addressed in *Weeks,* there is no question here as to the citizenship status of the LaPlantes and Wellmans. Congress resolved their status back in 1924. 8 U.S.C., Sec. 1401(a)(2). *Weeks* is therefore not in point.

VI. CONCLUSION

While the federal government has pre-empted state jurisdication over reservation Indian affairs, the federal government has never pre-empted itself. Respondents and amici have put forth no good reason why the diversity statute should not be applied as it was written, to all citizens of every state, including those citizens who happen to be reservation Indians. To create a judicial exception to the diversity statute serves no purpose but to expand — by default — the jurisdiction of tribal courts. Such an expansion furthers no meaningful federal policy. The judgments

of the courts below should be reversed with instructions to allow this diversity case to proceed in the Federal District Court of Montana.

DATED this 11th day of November, 1986.

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